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Supreme Court of the United States

OCTOBER TERM—1967.

No. 916

HOME TOWN FOODS, INC. and FOREMOST DAIRIES, INC.,

Petitioners,

versus

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

HOME TOWN FOODS, INC. and FOREMOST DAIRIES, INC. petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on July 21, 1967.

OPINIONS BELOW.

The Findings of Fact, Conclusions of Law and Order of the United States District Court for the Middle District of Alabama (Appendix B, *infra*, pp. 36-52)

are not officially reported but are reported at 17 Wage Hour Cases 225, 53 Labor Cases ¶ 31,753. The Opinion of the Court of Appeals (Appendix A, *infra*, pp. 19-34) is reported at 381 F.2d 653.

JURISDICTION.

The Judgment of the Court of Appeals was rendered on July 21, 1967 (R. 536; p. 19 *infra*).[1] Rehearing was denied on September 20, 1967 (R. 570; p. 35 *infra*). The jurisdiction of this Court is invoked under 28 U.S.C § 1254 (1).

QUESTION PRESENTED.

Whether an employee's hours of work must fluctuate below forty hours per week, in addition to fluctuations in overtime hours, to constitute "irregular hours of work" under Section 7(f) of the Fair Labor Standards Act.

STATUTE INVOLVED.

Section 7(f) of the Fair Labor Standards Act, as amended, 63 Stat. 912, 29 U.S.C. §207(f) provides:[2]

> No employer shall be deemed to have violated subsection (a) by employing any employee for a

[1] "R." refers to Transcript of Record certified by the Court of Appeals.

[2] When this litigation began, this section of the Act was designated Section 7(e). In the Fair Labor Standards Amendments of 1966, 80 Stat. 830, Public Law 89-601, Title II, § 204 (d)(1) it was redesignated 7(f), but its text remained unchanged. All citations to this section hereinafter have been changed to reflect the current designation.

workweek in excess of the maximum workweek applicable to such employee under subsection (a) if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this title (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

STATEMENT.

In early 1965 representatives of the U. S. Department of Labor, Wage and Hour Division, inspected several of Petitioner's plants and asserted that employees paid on Section 7(f) "Belo"[2] contracts did not qualify for such pay plans solely because their hours of work fluctuated in the overtime range only—i.e., they were not sent home from time to time with less than forty hours work. It is undispted that all the formal requirements of Section 7(f) were met. Separate written contracts embodied the terms set out in *Belo* and Section 7(f) and payment pursuant to these contracts was supported by accurate time and pay-

[2] *Walling v. A. H. Belo Corp.*, 316 U.S. 624, 62 S.Ct. 1223, 86 L.ed 1716 (1942), attached as Appendix C, *infra*, pp. 53-73.

roll records. Petitioners had long used identical contracts at many of their plants and these contracts had previously been inspected without criticism by Wage Hour Division officials.

At about the same time Petitioners' contracts were first criticized, the Secretary amended his Interpretative Bulletin, 29 Code of Federal Regulations, Section 778.406, issued February 2, 1965, to incorporate this "below 40" requirement (Appendix A, pp. 26-27, footnote 7).

Proceedings Below:

In order to clarify their obligations under the Act and under an injunction issued by the Federal District Court for the Middle District of Alabama, Petitioners on July 17, 1965, requested that Court pursuant to Rule (60b), Federal Rules of Civil Procedure, to construe Section 7(f) (R.12-16). The Secretary responded with a prayer for adjudication of civil contempt (R. 17-19).

The District Court found, as Petitioners had agreed, that "except for such absences (due to vacations, holidays, sicknesses and personal reasons of the employees (R. 477)), these employees have regularly worked minimum daily and weekly schedules totaling forty hours a week or more." (R. 478; Appendix B, p. 39). The Court concluded, therefore, that employees were not subject to the "type of fluctuation" found in *Walling v. A. H. Belo Corp.*, 316 U.S. 624, or in *Walling v. Halliburton Oil Well Cementing Com-*

pany, 331 U.S. 17, 67 S.Ct. 1056, 91 L.ed. 1312 (1946), and that Petitioners' employees had not worked "irregular hours of work" within the meaning of Section 7(f) of the Act (R. 484; p. 45, *infra*). The Court disregarded the overtime premium payments made under the contracts and ordered substantial back wages and compensatory fines (R. 488-489).

Since this erroneous "below forty" requirement was applied, the detailed evidence on fluctuations in overtime hours was not involved in the appeal nor need it be considered in this petition except as a matrix in which this dispute of statutory interpretation arises.

The United States Court of Appeals for the Fifth Circuit affirmed, based on the following holding:

> If the fluctuation of hours in average workweeks varies only in overtime hours, there is not such irregularity of hours, in our view, as would justify our holding that individual employment contracts under Section [7(f)] are valid. Where employees regularly work at least the maximum number of hours per workweek permitted without overtime pay being due under Section 7(a), and any irregularity of fluctuation in workweek hours occurs only in hours over the maximum, in overtime hours, such fluctuation does not constitute 'irregular hours of work' and Belo contracts with such employees are invalid under Section [7(f)]. (R. 550-551; Appendix A, pp. 32-33.)

It is this interpretation of Section 7(f) which Petitioner requests this Court to consider and correct.

REASONS FOR GRANTING THE WRIT.

I.

This case is of great importance in the administration of the Fair Labor Standards Act because the decisions below will deny to thousands of employees across the nation the financial security to which they are entitled under this Court's decisions in *Belo* and *Halliburton* and under Congress' mandate in Section 7(f).

Section 7(f) is a "safety valve" in the Fair Labor Standards Act. This Court and Congress recognized that employees whose jobs require irregular and unpredictable hours of work from week to week would suffer from varying "take home" pay if a strict and inflexible application of the overtime provisions of the Act were required. An employer could always remedy the pay variations resulting from hours fluctuating below forty by paying a salary of forty hours' pay in short weeks. However, fluctuations in overtime hours cause especially drastic variations in pay because of the shift to higher overtime rates. Prior to the *Belo* decision, there was no solution to this problem under then existing enforcement policies.

Meeting this situation in *Belo*, this Court held that it would not

". . .approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of *steady income to employees with irregular hours*. . . . This policy is based upon a common sense recognition of the special problems confronting the employer and employees in businesses where the work hours fluctuate from week to week and from day to day. Many such employees value *the security of a regular weekly income*. They want to operate on a family budget, to make commitments for payments on homes and automobiles and insurance. Congress has said nothing to prevent this desirable objective. This Court should not." 316 U.S. at 635 (Appendix C, pp. 65-66). (Emphasis supplied.)

By permitting a guarantee to include overtime pay (at a time when the employer could already guarantee at least forty hours pay with no wage hour consequences), this Court recognized that employees who work fluctuating *overtime hours* desire to plan their budgets at a level commensurate with their *actual income, including overtime pay,* and that they have a right to do so under the Act.

Congress expressly approved this Court's decisions in *Belo* and *Halliburton* when it enacted what is now Section 7(f). The chief sponsor of the provision explained that it "gives specific legislative approval to Belo type contracts (upheld by the United States Su-

preme Court), under which an employer may pay his employees who work *different hours each week a fixed guaranteed weekly salary*, thus assuring employees stability of income and employment." 95 Congressional Record A5475 (Quoted by the Court of Appeals, Appendix A, p. 21, *infra*, footnote 3).

Practical Effect:

The interpretation of the Court of Appeals in the instant case will deny the benefits of a stable weekly wage to hundreds of thousands of employees who were intended to benefit from the *Belo* decision and Section 7(f). Under the Court of Appeals' interpretation, guaranteed weekly wage contracts may be used *only for employees who are frequently sent home with substantially less than forty hours' pay because of lack of work.* (The Division ignores absences when employees take time off during slack periods for reasons of personal convenience.)

As a practical matter, hardly any employees will qualify for a 7(f) guaranty on this test. Under a 7(f) contract the employer has committed himself to pay such employees the stipulated weekly guarantee of more than forty hours' pay even in slack periods; therefore, he will probably assign routine duties to "7(f) employees" so that they will usually work the same forty-hour workweek as production employees without a guaranty. For example, on-call servicemen in Petitioner's plants were paid on Belo contracts because when any equipment broke down, they worked around the clock to get it repaired. When all equip-

ment is running smoothly, they were not sent home, though they did leave whenever personal convenience required. Instead, they performed routine maintenance duties and worked about forty hours per week as did production employees. A man on a fifty-hour guaranty simply will not be sent home ahead of employees without a guaranty who will work as close to forty hours as their employer can schedule them. For this reason, "7(f) employees" will work about forty hours in most weeks, but because of their special responsibilities, they will work substantial overtime hours at unpredictable intervals.

Petitioners' "7(f) employees" normally performed their unpredictable overtime work after business hours and without supervision. The 7(f) guaranty furnished an incentive for the employees to go home as soon as their responsibilities permitted and not "ride the clock."

Since the District Court's decision in this case, Home Town Foods allows its employees' pay to vary as hours vary in the overtime range. There is no additional cost to the company or benefit to the employees; all such employees were already paid more than the statutory minimum wage and more than the statutory overtime pay. The employees are the only ones who suffer. They can reasonably expect forty hours' pay, but they cannot plan their budgets at their actual income level because they cannot depend on overtime earnings which are substantial but unpredictable. They are denied any security with respect

to their overtime earnings—just the security that only *Belo* and 7(f) provide. The logical consequence of the Court of Appeals' decision, therefore, is that there will be hardly any employees who work "irregular hours" and hardly any employees who will receive the benefits of a Section 7(f) contract.

Proper Interpretation:

It is submitted that the proper analysis and interpretation of Section 7(f) is as follows: inflexible application of the overtime pay requirements to employees whose job duties necessitate irregular hours of work from week to week and who are already paid in excess of the statutory minimum wage and overtime requirements results in substantial variations in the take home pay of such employees. This problem exists only with respect to variations in overtime hours, since an employer has always been permitted to guarantee forty hours' pay for fluctuating hours of work. These employees can be expected to and are entitled to consider their overtime earnings in establishing their standard of living, but without a special guaranty, they do not have the security of knowing that any part of these overtime earnings will be included in their regular weekly income. Therefore, this Court and Congress provided relief from this unnecessary detrimental "side effect" of the overtime requirements.

This relief under Section 7(f) should be available whenever (a) the duties of the job, not the whim of the employer, cause varying hours of work, and (b)

the variations in hours of work are sufficient to materially affect gross pay. The wording and the history of Section 7(f) prescribe no other limitations on the use of weekly guaranty contracts.

The proper administration of the Act makes it most important that this Court grant certiorari and preserve the benefits provided by Section 7(f) for employees whose jobs necessitate varying overtime hours.

II.

The Court of Appeals' interpretation of Section 7(f) violates fundamental rules of statutory interpretation in that it necessarily imputes to Congress an unnecessary and absurd act in passing 7(f).

The Secretary contended, and the Court of Appeals so held, that if an employee regularly works at least forty hours per week and the only irregularity is in the number of overtime hours he works, "he thus has the necessary workweek security referred to in the *Belo* case and the guaranteed weekly salary [of more than forty hours' pay pursuant to *Belo* and Section 7(f)] does no more." (R. 542; Appendix A, p. 25.)

The logical fallacy of this interpretation is manifest when the two following undisputed statements of basic wage hour law are considered.

First, a guaranty that an employee will receive at least forty hours pay even though he may work less

than forty hours in some weeks is a common pay plan and has always been permitted under the Act. Such a "forty hour salary" or guaranty does not involve 7(f) in any way and may be applied to any employee, regardless of his hours of work or job duties.

Second, Section 7(f) deals exclusively with a guaranty of *overtime pay*. It has absolutely nothing to do with pay for regular hours (forty or less per week).

Throughout this litigation these two basic premises have been studiously avoided by the Secretary and have been overlooked in the opinions of the District Court and Court of Appeals in this case and in the four previous District Court decisions on the subject.[4]

If this Court in *Belo* and Congress in Section 7(f) had intended to protect the employee's security of only a *minimum of forty hours' pay* and such a guaranty was already possible without objection from the Wage Hour Division, why did this Court and Congress provide special authorization to guarantee *more* than forty hours' pay? This would be totally necessary!

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[4] *Trager v. J. E. Plastics Mfg. Corp.*, 13 Wage Hour Cases 621, 34 Labor Cases ¶ 71,320 (S.D. N.Y. 1958); *Mitchell v. Independent Stave Co.*, 168 F.Supp. 830 (W.D. Mo. 1958); *Goldberg v. Winn-Dixie Stores, Inc.*, 15 Wage Hour Cases 641, 46 Labor Cases ¶ 31,334 (S.D. Fla. 1962); and *Wirtz v. Midland Finance Co.*, 16 Wage Hour Cases 141 (M.D. Ga. 1963). All of these decisions are considered poor precedent because they involve massive and flagrant violations of the Act; because the formal requirements of Section 7(f) were met, except in *Winn-Dixie*, these cases apparently involved "last ditch" defenses of illegal salaries, a common situation observed in *Atlantic Co. v. Walling*, 131 F.2d 518, 521 (5th Cir. 1942).

Nowhere in the *Belo* or *Halliburton* decisions or the legislative history of Section 7(f) is there any indication that the purpose of a Belo contract is to assure a *minimum* amount of pay but rather to assure that the employee's actual pay is *steady, regular* and *constant* in amount. But even if this Court and Congress had intended that forty hours' pay was to be "adequate workweek security," why did this Court and Congress expressly provide that an employer may guarantee overtime pay up to sixty hours' pay? If the Court of Appeals' interpretation is correct, Congress has provided a remedy which is applicable only when the problem does not exist. This would be absolutely absurd!

The Court of Appeals did not consider the above arguments and did not see the palpable fallacy in the Secretary's arguments. Instead, it rested its decision on the Secretary's assertion that Petitioner's interpretation of 7(f) would strike down the basic overtime requirements of Section 7(a). This is exactly the assertion that this Court rejected in *Belo* and *Halliburton*, and that Congress rejected in enacting Section 7(f). The assertion is disproved by 25 years experience under *Belo* and by Petitioner's limited use of guaranty contracts for only those employees who are peculiarly subject to fluctuating hours because of their job duties.

Therefore, this Court should grant certiorari and correct a palpably incorrect interpretation of an important remedial act of Congress.

III.

The Secretary's "below forty" rule, adopted by the Court of Appeals, conflicts with the principles established in BELO and is part of a determined administrative campaign to abrogate Section 7(f).

In *Walling v. A. H. Belo Corp.*, (attached hereto as Appendix C), this Court decided that a weekly guaranty contract substantially identical to those used by Petitioners "carries out the intention of Congress. . . ." because the contract provides all the benefits of the Fair Labor Standards Act plus the security of a steady income to employees with irregular hours.

> From the start, the Administrator of the Wage and Hour Division has disliked the Belo decision and has sought to whittle it down. . . . *Mitchell v. Brandtjen & Kluge, Inc.*, 228 F.2d 291, 294 (1st Cir. 1955), cert. denied, 352 U.S. 940 (1956).

> The Department of Labor, which has consistently opposed guaranteed wage plans, initially took the position that any wage plan which did not reflect actual hours worked in such workweek was invalid. *Mitchell v. Hartford Steam Boiler Inspection & Insurance Co.*, 235 F.2d 942, 943, (2nd Cir. 1956), cert. denied, 352 U.S. 832 (1956).

This administrative dislike of the *Belo* decision brought it back to this Court five years later to "define the area of [its] continued vitality, if any."

Walling v. Halliburton Oil Well Cementing Co., 331 U.S. 17, 25, 67 S.Ct. 1056, 1060, 91 L.ed 1312 (1947). This Court summarily rejected the Administrator's argument and affirmed *Belo*.

In 1949 Congress enacted Section 7(f), specifically approving the *Belo* decision.

The Wage and Hour Division then concocted the administrative requirement that a "Belo" or 7(f) contract was invalid if the employee did not work more than the guaranteed hours in "a significant number of workweeks." This requirement was rejected by the Courts as "the search for handy, arbitrary rule of thumb criteria, displacing inquiry and deliberative judgment, leaving it all to the wisdom of the Administrator," *Mitchell v. Adams, d/b/a Macon Shirt Co.*, 230 F.2d 527, 529 (5th Cir. 1956) and as a request for "unwarranted judicial legislation on our part to read into Section [7(f)] another requirement which Congress chose not to put there. . .", *Mitchell v. Brandtjen & Kluge, Inc., supra,* at 296, and as unlikely to reflect the intent of Congress because "Congress could hardly have found a *less* precise way to express such an intention." (Emphasis in the court's.) *Mitchell v. Hartford Steam Boiler Inspection & Insurance Co., supra* at 946.

Having lost that battle, the Secretary ceased attacking the upper end of the hourly range and began attacking the lower end with his "below forty" rule here involved. This rule first appeared in 1958 in

Trager v. J. E. Plastics Mfg. Corp., 13 Wage Hour Cases 621, 34 Labor Cases ¶ 71,320 (S.D. N.Y.) where it was adopted and in *Mitchell v. Independent Stave Co., Inc.*, 168 F.Supp. 830, 832 (W.D. Mo.) where it was rejected. This administrative rule was first officially set out in an Opinion Letter of the Wage-Hour Administrator dated March 7, 1962, CCH Labor Law Reporter ¶ 30,617 (Appendix A, p. 29) and was first published in the Secretary's Interpretative Bulletin, 29 CRF Section 778.406, on February 2, 1965. (Appendix A, pp. 26-27.)

The "below forty" requirement was not raised in any case prior to 1958, even though facts were such that it could have been. Although the Secretary purports to be interpreting the *Belo* decision, 15% of the employees whose contracts were approved in the *Belo* case never worked less than forty hours. (See the schedule of hours worked by Belo employees as published in *McComb v. Utica Knitting Co.*, 164 F.2d 670, 675 (2nd Cir. 1957).)

The Secretary's enforcement policy, as adopted by the Court of Appeals, will effectively abrogate Section 7(f). For the reasons set out above, few employees who are guaranteed pay for more than forty hours are likely to be sent home with less than forty hours work. However, hundreds of thousands of employees perform jobs which require them to work unpredictable but substantial numbers of overtime hours, and it is these workers who were intended to benefit from Section 7(f). This Court should grant certiorari, reject the Secretary's "below forty" rule as an improper attempt to abrogate the *Belo* decision and Section

7(f), and preserve Section 7(f) as a means of mitigating the unintended insecurity imposed by a strict application of the general overtime requirements.

CONCLUSION.

The problem presented in this case is a constantly recurring one in the administration of the Act. Hundreds of thousands of employees must work irregular hours and deserve the security offered by Section 7(f). The reasoning behind the Secretary's position is palpably fallacious. Nevertheless, if this first appellate test of the "below forty" rule is allowed to stand against 7(f), few employers will continue to provide its benefits on pain of being forced to pay overtime premium twice. This case presents a clear test of the "below forty" rule—the facts are basically undisputed and untainted by other violations, all other requisites of Section 7(f) have been met, and the decisions below are unequivocal on this point.

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

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and

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CERTIFICATE OF SERVICE.

I HEREBY CERTIFY that I have this ... day of December, 1967, caused a copy of the foregoing Petition for Writ of Certiorari to be furnished to the following individual by depositing same in the U. S. Mail, postage prepaid:

Charles Donahue, Solicitor
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.....
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APPENDICES